

*Approved  
July 21, 2023*

**FACILITIES USE AND SERVICE AGREEMENT  
FOR TIMBER CREEK MULCH SITE**

**THIS FACILITIES USE AND SERVICE AGREEMENT FOR TIMBER CREEK MULCH SITE** (“Agreement”) is made as of the 1<sup>st</sup> day of August, 2023 (“Effective Date”), by and between the Village of Bald Head Island, a North Carolina municipal corporation (hereinafter referred to as “Village”), and Island Contracting, Inc., a North Carolina corporation (hereinafter referred to as “Contractor” and together with Village referred to as the “Parties” or each individually as a “Party”).

**RECITALS**

**WHEREAS**, the Village leases or expects soon to be leasing from the Bald Head Association and subleases to Contractor certain property on Bald Head Island located at 100 Timber Creek Sewer Service Road as shown in hatching on **Exhibit A** hereto and generally known as the Timber Creek Mulch Site (hereinafter referred to as the “Property” and the sublease between the Parties hereinafter referred to as the “Sublease”); and

**WHEREAS**, the Village desires that such Property be used as set forth herein as a site for the compost, processing, storage and delivery of mulch for use in landscaping (hereinafter referred to as the “Mulch Site”); and

**WHEREAS**, the Village desires that vegetative debris be received and mulch be provided to the Village and to the public as set forth herein; and

**WHEREAS**, the Village is willing to contribute funds and to allow Contractor to use the Property for the operation of the Mulch Site as set forth herein.

**WITNESSETH:**

**NOW, THEREFORE**, Village and Contractor, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, have mutually promised unto and agreed, each with the other, as follows:

1. **Grant of Right to Use.** Village hereby grants to Contractor the exclusive right to use the Property for the exclusive purpose of the Mulch Site, such right to be revocable only upon the terms and conditions set forth herein. This Agreement supersedes and replaces in its entirety that certain Facilities Use and Service Agreement For Timber Creek Mulch Site between the Parties dated March 1, 2014, which prior Agreement is hereby terminated and of no effect.

2. **Term and Termination.** This Agreement shall become effective as of the Effective Date and will end on June 30, 2028 (the “Initial Term”) or, in the event this Agreement is renewed pursuant to this Section, then shall continue throughout each Renewal Term. Provided, however, the Term of this Agreement shall, in any event, end not later than ten (10) years from the Effective Date. This Agreement shall be deemed to automatically renew for

consecutive one (1) year terms (each such term referred to as a “Renewal Term”), under the same terms and conditions provided herein, at the end of the Initial Term, unless one of the Parties provides prior written notice to the other Party, at least three (3) months prior to the end of the Initial Term, or the Renewal Term, as applicable, of its intent not to automatically renew this Agreement. This Agreement may be terminated at any time by mutual agreement of the Parties. If this Agreement is unilaterally terminated by one of the Parties without cause or other than as provided herein prior to the expiration of the Initial Term or any Renewal Term, the other Party shall be entitled to all remedies available at law and in equity. This Agreement shall automatically terminate as of the effective date of termination of any termination of the Village lease of the Property with the Bald Head Association or upon any termination of the Village’s Sublease of the Property to Contractor.

3. **Village Fee.** For and in consideration of the Contractor’s use of the Property for the Mulch Site, Village shall pay to Contractor a fee of Eight Thousand Three Hundred Thirty-three and 33/100 Dollars (\$8,333.33) Dollars per month (“Village Fee”). The Village Fee shall be paid monthly, in advance. By July 1, 2028 and at July 1 of each Renewal Term, the Village Fee shall be adjusted by agreement of the Parties, the adjusted Village Fee to be effective as of the commencement of the following Renewal Term. If the Parties fail to agree by March 31 of each Renewal Term, this Agreement shall terminate at the end of the then-current Term.

4. **Price.** Contractor shall not charge a price or fee to Island property owners or the Village for the drop-off of vegetative debris or pick-up of mulch from the Property, except as set forth herein. Contractor may charge to other businesses an excess loading fee, tipping fee or fee for special handling or segregation of materials (e.g., palm trees or palm fronds) according to the fee schedule adopted and maintained by the Village at Village Hall. Contractor may charge a fee to other businesses for services it provides. Contractor also may charge for the delivery of mulch from the Mulch Site to third parties and for off-site Contractor services, such as mulch spreading. Contractor also may impose reasonable limitations, subject to Village’s approval, on the quantity of mulch which any person or entity may receive.

5. **Access to Property.** Contractor shall have full and complete access to the Property at all times.

6. **Covenants and Responsibilities of Contractor.** Throughout the Initial Term and any subsequent Renewal Term of this Agreement, Contractor shall:

a. Undertake the necessary administrative and technical activities, including, without limitation, employment and supervision of necessary Contractor and third-party personnel and labor;

b. Operate the Mulch Site in a sound, safe manner, and in accordance with best practices for similar facilities;

c. Operate the Mulch Site at all times in compliance with the Village’s yard debris site permit from NCDENR, #YWN-10-014;

- d. Operate the Mulch Site at all times in compliance with the Village's Lease from the Bald Head Association, which Lease provisions are incorporated herein fully by reference;
- e. Notify the Village immediately and, in any event, not more than three (3) days after Contractor's knowledge of any violation of the Lease;
- f. Punctually pay when due all charges for electricity, water and other utilities;
- g. Maintain the mulch inventory free and clear of any liens;
- h. Maintain any insurance on the inventory, at Contractor's account;
- i. Coordinate with Village, as necessary, regarding any Internal Combustion Engine or other regulatory issues necessary for proper operations;
- j. Comply with Village Ordinances and all other applicable laws;
- k. Maintain standard commercial general liability and auto liability insurance in a sum not less than Two Million Dollars (\$2,000,000.00) on the Mulch Site operations naming the Bald Head Association and the Village as additional named insureds and containing waivers of subrogation against the Bald Head Association and the Village;
- l. Maintain worker's compensation insurance as required by applicable law;
- m. Provide Village, upon ten (10) days written request, proof of required insurance coverages;
- n. Timely arrange for and pay any fee (such as labor, equipment, insurance, transportation, or other expenses or fees whatsoever) concerning or arising from the Mulch Site;
- o. Defend, hold and maintain Village and its officers, agents and employees harmless from any claims, liabilities, cost or damage arising from or concerning any deficiency in amount, quality or performance of the mulch alleged by a client of Contractor or otherwise concerning the Mulch Site or any dispute between Contractor and its client or other third-party;
- p. Maintain Contractor's personal property and equipment at the Property, but not the mulch inventory, insured at all times against the risks for which provision of such insurance is usually made by other persons engaged in a similar business similarly situated (including, without limitation, insurance for theft, fire, or storm and other hazards and insurance against liability on account of damage to persons or property);
- q. Maintain the Property in good order and condition;

r. Maintain the Property free and clear of any liens or other encumbrances caused by or through Contractor;

s. At its sole cost and expense comply, or cause compliance with, and for matters arising out of, all federal, state, foreign and local laws or regulations, agreements with governments, and court and administrative orders with respect to Environmental Conditions, including without limitation, the Resource Conservation and Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act, with respect to the Property. For purpose hereof, "Environmental Conditions" means any condition with respect to soil, surface waters, groundwaters, stream sediments, and similar environmental conditions off site (concerning the matters subject of this Agreement) and on site of the Property which could require remedial action and/or may result in claims, demands and liabilities to Contractor or Village by third parties including, without limitation, governmental entities;

t. Contractor shall release, indemnify, defend and hold harmless Village and its officers, agents and employees (the "Indemnified Parties") from and against those claims, damages and costs which arise by fault of Contractor and without fault of Village, or its third-party agents or representatives, arising from:

- i. Personal injury, death or disease arising from operation of the Facility;
- ii. Environmental liability, meaning contamination to air, soil or water arising from operation of the Facility;
- iii. Damage to property of a third-party at the Facility; and
- iv. Breach by Contractor of its aforesaid covenants and responsibilities;

whether or not such loss or damage is based in contract, warranty, tort (including negligence), strict liability, or otherwise and indemnify the Indemnified Parties against loss, claim or expenses resulting from same.

7. **Covenants and Responsibilities of Village.** Throughout the Initial Term and any subsequent Renewal Term of this Agreement, Village shall:

- a. Punctually pay when due the Village Fee;
- b. Maintain standard commercial general liability and auto liability insurance in a sum not less than Two Million Dollars (\$2,000,000.00) on the Mulch Site operations naming the Bald Head Association and the Contractor as additional named insureds and containing waivers of subrogation against the Bald Head Association and the Contractor; and
- c. At the conclusion of this Agreement, the Village shall consume any remaining mulch inventory.

8. **Events of Default.** A Party shall be deemed to be in default under this Agreement, upon the occurrence by such Party of any of the following (each an “Event of Default”):

a. Failure to pay or perform any material obligation of this Agreement and such failure remains uncured more than ten (10) days from written notice by the other Party;

b. **Voluntary Liquidation, Dissolution or Bankruptcy.** Such Party, liquidates, dissolves, dies, or becomes incompetent, its business is suspended; files or commences a voluntary petition, case, proceeding, or other action seeking reorganization, arrangement, readjustment of its debts, or any other relief under any existing or future law of any jurisdiction, domestic or foreign, state or federal, relating to bankruptcy, insolvency, reorganization, or relief of debtors, or such Party takes any other action indicating its consent to, approval of, or acquiescence in, any such petition, case, proceeding, or other action seeking to have an order for relief entered with respect to it or its debts; such Party applies for, or consents to or acquiescence in, the appointment of a receiver, trustee, custodian, or other similar official for such Party or for all or a substantial part of its property; such Party makes a general assignment for the benefit of creditors; or is unable to pay its debts as they mature or admits in writing its inability to pay its debts as they mature.

c. **Involuntary Bankruptcy.** An involuntary petition, case, proceeding, or other action is commenced against such Party under the United States Bankruptcy Code or similar laws of other applicable jurisdictions, as amended, or such Party’s creditors are seeking reorganization, arrangement, readjustment of its debts, or any other relief under any existing or future law of any jurisdiction, domestic or foreign, state or federal, relating to bankruptcy, insolvency, reorganization, or relief of debtors; a receiver, trustee, custodian, or other similar official is involuntarily appointed for such Party for all or a substantial part of its property or assets; or any case, proceeding, or other action seeking issuance of a warrant of attachment, execution, distraint, or similar process against all or a substantial part of such Party’s assets or property results in the entry of an order for such relief; and any of the foregoing continues for ninety (90) days without being vacated, discharged, stayed, bonded, or dismissed.

9. **Remedies.** Upon the occurrence and continuation past any applicable cure period of an Event of Default, the obligations of the non-defaulting Party shall terminate (except any obligation for payment already accrued) and such non-defaulting Party shall have, in addition to the rights and remedies contained in this Agreement, all of the rights and remedies now or hereafter available at law or in equity. The non-defaulting Party may, at its option, exercise any one or more of such rights and remedies individually, partially, or in any combination from time to time. No right, power, or remedy conferred hereunder shall be exclusive of any other right, power, or remedy referred to therein or now or hereafter available at law or in equity.

10. **Intentionally Omitted.**

11. **Force Majeure.** If either Party is rendered wholly or partly unable to perform its obligations under this Agreement because of Force Majeure that Party shall be excused from

performing its obligations under this Agreement to the extent so affected by Force Majeure, provided that:

- a. The non-performing Party, as soon as practicable after the occurrence of Force Majeure, gives to the other Party written notice describing the particulars of the Force Majeure,
- b. The Scope and duration of the suspension of performance is reasonably required by the Force Majeure,
- c. The non-performing Party shall use its best efforts to remedy its inability to perform.

In case the event of Force Majeure lasts more than thirty (30) days, the Parties shall agree if and how to execute this Agreement further. If no agreement can be reached, the Party whose performance is not prevented by the Force Majeure may terminate this Agreement by written notice with immediate effect any time after such thirty (30) days.

Force Majeure Event shall mean an event such as such as war, rebellion, riots, unforeseen strikes, flood and fire, explosion, earthquake, hurricane, unavoidable accident, embargo, insurrection, revolution, civil commotion, sabotage, acts of God or the enemies of the United States of America, perils of the sea, barratry, unforeseen governmental demand or action, regulation or requirement or interference, prohibition or restriction by any competent government or any officer or agent thereof having jurisdiction in the Property, restraint by injunction or other legal process from which the Party restrained cannot reasonably relieve itself by giving security or by other procedure, or any other unforeseen cause whatsoever that is beyond a Party's reasonable control whether or not of the character hereinbefore set forth.

12. **Miscellaneous.**

- a. All notices, requests, demands and other communications hereunder shall be in writing and shall be delivered by hand or by email, or mailed by certified mail, return receipt requested, first class postage prepaid, or sent by Federal Express or similarly recognized overnight delivery service with receipt acknowledged addressed as follows:

If to Village:

Village of Bald Head Island  
ATTENTION: Village Manager  
461 Lighthouse Wynd  
Post Office Box 3009  
Bald Head Island, North Carolina 28461  
Email: [cmccall@villagebhi.org](mailto:cmccall@villagebhi.org)

If to Contractor:

Island Contracting, Inc.  
ATTENTION: Wayne Krahn  
Post Office Box 11074  
Southport, North Carolina 28461  
Email: islandcontracting@bellsouth.com

If delivered personally or by email, the date on which a notice, request, instruction or document is delivered shall be the date on which such delivery is made and, if delivered by mail or by overnight delivery service, the date on which such notice, request, instruction or document is received shall be the date of delivery. In the event any such notice, request, instruction or document is mailed or shipped by overnight delivery service to a Party in accordance with this Section and is returned to the sender as non-deliverable, then such notice, request, instruction or document shall be deemed to have been delivered or received on the third (3<sup>rd</sup>) day following the deposit of such notice, request, instruction or document in the United States mail or the delivery to the overnight delivery service. Any Party hereto may change its address specified for notices herein by designating a new address by notice in accordance with this Section.

b. Waiver. Any failure on the part of any Party hereto to comply with any of its obligations, agreements or conditions hereunder may be waived by any other Party to whom such compliance is owed. However, a Party's failure to insist upon strict performance of any provision of this Agreement shall not be deemed to be a waiver thereof. Subject as aforesaid, no waiver shall be effective unless specifically made in writing and signed by a fully authorized officer of the Party granting such waiver. No waiver of any provision of this Agreement shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver.

c. Expenses. All expenses incurred by the Parties hereto in connection with or related to the authorization, preparation and execution of this Agreement and the closing of the transactions contemplated hereby, including, without limitation of the generality of the foregoing, all fees and expenses of agents, representatives, counsel and accountants employed by any such Party, shall be borne solely and entirely by the Party which has incurred the same.

d. Assignment; Binding Effect; Successors and Assigns. This Agreement may not be assigned without the written consent of the other Party. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, legal representatives, executors, administrators, successors and permitted assigns.

e. Severability. If any term or provision in this Agreement shall be held to be illegal or unenforceable, in whole or in part, under any enactment or rule of law, such term or provision or part shall be given the fullest force and effect permitted under such enactment or rule of law, and to the extent that such term or provision is held to be illegal or unenforceable, it shall be deemed not to form part of this Agreement, but the enforceability of the remainder of this Agreement shall not be affected.

f. Headings. The section and other headings in this Agreement are inserted solely as a matter of convenience and for reference, and are not a part of this Agreement.

g. Further Assurances. Each Party shall execute and deliver such additional documents, certificates and shall take such further actions as shall be reasonably required to give full effect to the terms and intent hereof.

h. Entire Agreement; Amendment. This Agreement constitutes the entire agreement among the Parties hereto and supersedes and cancels any prior agreements, representations, warranties, or communications, whether oral or written, among the Parties hereto relating to the transactions contemplated hereby or the subject matter herein, 2007. Neither this Agreement nor any provision hereof may be changed, waived, discharged, amended or terminated orally, but only by an agreement in writing signed by the Party against whom or which the enforcement of such change, waiver, amendment, discharge or termination is sought.

i. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina, excepting conflicts of laws principles.

j. No Joint Venture. This Agreement does not create an association, partnership, agency or joint venture between or among the Contractor and the Village. None of the Parties shall have any right, power, or authority to enter into any agreements or undertakings on behalf of any other Party hereto or to act as agent or representative or otherwise bind any other Party hereto.

k. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

l. Pronouns and Number. All pronouns used herein shall be deemed to refer to the masculine, feminine or neuter gender as the context requires. Where the context so requires, the singular shall include the plural and vice versa.

m. Exhibits Incorporated. All Exhibits attached hereto are incorporated herein by reference.

n. Time of Essence. Time is of the essence in this Agreement.

o. Dispute Resolution. Any dispute concerning the entry, meaning, enforcement or effect of this Agreement not resolved by amicable discussion shall be resolved exclusively by litigation in the General Courts of Justice of Brunswick County, North Carolina. The prevailing Party in any litigation, as determined by the court, shall be entitled to receive its attorneys' fees and expenses, in addition to costs.

***Signature Page Follows***

*Approved  
July 21, 2023*

**IN WITNESS WHEREOF**, the Parties hereto have executed this Facilities Use and Service Agreement as of the day and year first above written.

VILLAGE OF BALD HEAD ISLAND,  
a North Carolina municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

ISLAND CONTRACTING, INC.,  
a North Carolina corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

*Approved*  
*July 21, 2023*

**EXHIBIT A**

**Description of Property**